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No. 87-1720

In the Supreme Court of the United States

OCTOBER TERM, 1987

HUBERT C. TAYLOR, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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MEMORANDUM FOR THE FEDERAL RESPONDENT

1. Petitioner is a former coal miner who filed a claim for black lung benefits in June 1977 after 42 years of coal mine employment (Pet. App. 12a, 14a). An administrative law judge (ALJ), applying the Department of Labor's governing regulation, 20 C.F.R. 727.203, concluded that petitioner was entitled to a presumption that he was eligible for benefits because he had worked in coal mines for more than ten years and proved the existence of simple pneumoconiosis by x-ray evidence (Pet. App. 24a). However, the ALJ found the presumption rebutted under Section 727.203(b)(2) because petitioner had only a mild respiratory impairment that did not prevent him from performing his usual coal mine work (Pet. App. 26a).

The ALJ nevertheless awarded benefits. Relying on *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the ALJ concluded that peti-

tioner's eligibility must be evaluated under 20 C.F.R. 410.490, a regulation governing black lung benefits claims filed before July 1, 1973, and adjudicated by the Department of Health, Education, and Welfare (HEW), as well as under Labor's regulation. The claimants in *Halon* and *Coughlan* invoked the language of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. 902(f)(2), which requires that the "criteria" applied by Labor in adjudicating certain claims "not be more restrictive than the criteria applicable" to claims adjudicated by HEW. The courts agreed with the claimants that Labor's regulation violated this provision because it does not permit claimants with fewer than ten years of coal mine experience to invoke the presumption of entitlement to benefits, which HEW's regulation permitted.

Notwithstanding that the pertinent language of the Labor and HEW rebuttal provisions is very similar,[1] the ALJ found the evidence insufficient to rebut the presumption under HEW's provision (Pet. App. 27a & n.3). He reasoned that HEW's regulation, as construed in *Haywood* v. *Secretary of Health & Human Services*, 699 F.2d 277, 285 (6th Cir. 1983), required proof not only that the claimant "could physically work as a coal miner" but also that the claimant was not "vocationally disabled," that is, could not obtain "work as a coal miner in the immediate area of his residence." Because no such vocational

[1] The pertinent portion of Labor's rebuttal provision, Section 727.203(b)(2), provides that the presumption is rebutted where "[i]n light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title)." The pertinent portion of HEW's rebuttal provision, Section 410.490(c)(2), provides for rebuttal if "[o]ther evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1))."

evidence had been offered, the ALJ found that HEW's presumption had not been rebutted (Pet. App. 28a).

2. The Benefits Review Board reversed the ALJ's award (Pet. App. 6a-10a). It concluded that *Halon* and *Coughlan* should not be applied to claims—such as this one—arising in circuits that had not found Labor's regulation inconsistent with Section 402(f)(2) (Pet. App. 9a-10a). The Board affirmed the ALJ's finding that the presumption had been rebutted under Labor's regulation because petitioner did not challenge that finding (*id.* at 10a) and found it unnecessary to decide the applicability of *Haywood*'s vocational disability rule (*ibid.*).

The court of appeals affirmed (Pet. App. 1a-5a). Relying on its previous decision in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987), which, contrary to *Halon* and *Coughlan*, held that in enacting Section 402(f)(2) " 'Congress only intended to prohibit the Secretary from applying more restrictive medical criteria' " (Pet. App. 4a (emphasis omitted)), the court concluded that Labor's regulation is not inconsistent with Section 402(f)(2) insofar as it contains adjudicatory and evidentiary rules that are more restrictive than HEW's. Because petitioner did not establish that he qualified for benefits under Labor's regulation, the court upheld the Board's decision (Pet. App. 5a).

3. In *Pittston Coal Group* v. *Sebben*, cert. granted, No. 87-821 (Feb. 22, 1988, and Apr. 4, 1988), this Court will decide whether Labor's regulation is contrary to Section 402(f)(2) because it does not allow former coal miners with fewer than ten years of coal mine employment to invoke the presumption of entitlement to benefits. In this case, the issue is whether Labor violated Section 402(f)(2) by allowing the presumption to be rebutted by medical evidence showing that a miner is able to do his usual coal mine work in the absence of vocational evidence showing

that the miner could obtain a coal mine job in the immediate area of his residence. Although four courts of appeals have found Labor's regulation contrary to Section 402(f)(2) because miners with fewer than ten years of coal mine experience may not invoke the presumption,[2] no court of appeals has held that the rebuttal provisions in Labor's regulations are contrary to Section 402(f)(2).[3]

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[2] In addition to the Third Circuit in *Halon* and the Eighth Circuit in *Coughlan*, the Fourth Circuit in *Broyles* v. *Director, Office of Worker's Compensation Programs*, 824 F.2d 327 (1987), cert. granted, No. 87-1095 (Apr. 4, 1988), and the Sixth Circuit in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (1987), petition for cert. pending, No. 87-1045, have found the regulation contrary to Section 402(f)(2).

[3] The Sixth Circuit, which held in *Kyle* that Labor's regulation is contrary to Section 402(f)(2) because claimants with fewer than ten years of coal mine experience cannot invoke the presumption, has suggested that Labor's regulation is not contrary to Section 402(f)(2) insofar as it authorizes rebuttal by two methods not explicitly enumerated in HEW's regulation. See *Warman* v. *Pittsburg & Midway Coal Co.*, 839 F.2d 257, 258 n.1 (6th Cir. 1988); *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987). The two additional rebuttal methods are proof that the claimant's disability did not arise out of coal mine employment and proof that the miner does not have pneumoconiosis (20 C.F.R. 727.203(b)(3) and (4)). As noted in our brief in *Sebben* (at 25-27), it seems plain that Congress did not intend to prevent rebuttal of the presumption in those two ways. (We are serving a copy of our brief in *Sebben* on petitioner.)

The Sixth Circuit has expressly rejected petitioners' argument by holding that Labor's regulation does not violate Section 402(f)(2) insofar as it allows rebuttal by proof that a claimant is physically able to perform coal mine work in the absence of evidence that the claimant would be able to obtain a coal mine job in the area in which he lives. *Ramey* v. *Kentland Elkhorn Coal Mining Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). See also *Taft* v. *Alabama By-Products Corp.*, 733 F.2d 1518, 1521-1522 (11th Cir. 1984), and *Director, Office of Workers' Compensation Programs* v. *Beatrice Pocahontas Co.*, 698 F.2d 680, 682 (4th Cir. 1983) (both rejecting the argument that voca-

We nevertheless agree with petitioner that this case should be held pending disposition of *Sebben*. If the Court decides that Labor's regulation is consistent with the statute because Section 402(f)(2) requires Labor to apply only *medical* criteria no more restrictive than those applied by HEW, and not HEW's adjudicatory and evidentiary rules, there would be no reason to disturb the court of appeals' decision here. However, if the Court rejects that argument, which was the basis for the court of appeals' decision, this case should be remanded to the court of appeals for it to consider whether the rebuttal provision in Labor's regulation, as applied in this case, is inconsistent with Section 402(f)(2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of as appropriate in light of *Pittston Coal Group* v. *Sebben* No. 87-821.

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tional evidence is required for this method of rebutting the presumption under Labor's regulation).

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